(3)

No. 08-1403

Supreme Court, U.S.
FILED
JUL 15 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CARISSA MARIE DANIELS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

GERALD A. HORNE
Pierce County Prosecuting Attorney

KATHLEEN PROCTOR*
Senior Deputy Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402
(253) 798-7400

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

The Washington Supreme Court is one of several jurisdictions which has considered the advantages and disadvantages, as well as the legal sufficiency, of two types of concluding jury instructions – "unable to agree" and "acquittal first" instructions. *State v. Labanowski*, 816 P.2d 26 (Wash. 1991). An "unable to agree" instruction allows a jury to render a verdict on a lesser offense if, after full and careful consideration of the evidence, it is unable to reach unanimous agreement on the greater charge; under an "acquittal first" instruction, the jury is not permitted to return a verdict on a lesser charge unless it has first unanimously agreed that the defendant is not guilty of the greater charge. In Washington, neither form of instruction is erroneous as a matter of law, but for policy reasons, the state supreme court indicated that juries should be instructed using the "unable to agree" type of instruction. The question presented in this case is when a defendant proposes that a jury be instructed in this manner and the jury returns a verdict indicating its inability to agree on the greater charge while convicting on the less serious charge, does the Double Jeopardy Clause allow the prosecution to retry the defendant on the more serious charge after she has successfully obtained a new trial on the less serious charge?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITION 7

A. Petitioner asks this court to review the propriety of giving "unable to agree" instructions, the sufficiency of their wording regarding jury deadlock and the necessity of declaring a mistrial when a jury so instructed cannot agree on the greater charge when none of these issues were properly preserved or litigated below 7

1. Washington favors "unable to agree" instructions; not only did petitioner fail to challenge the propriety of giving such instructions, her proposed instructions mirrored those given by the trial court 8

2. Petitioner failed to preserve her claim that a trial court is required to declare a mistrial whenever a jury cannot reach an agreement on a greater charge under "unable to agree" instructions 13

TABLE OF CONTENTS – Continued

Page

B. Petitioner overstates the existence of a conflict between the Ninth Circuit and Washington Supreme Court; she relies upon a decision where the Ninth Circuit was applying the AEDPA standard on habeas review which does not represent a clear "holding" of that court 15

CONCLUSION..... 22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Colwash, 564 P.2d 781 (Wash. 1977) 12

State v. Davis, 67 P.2d 894 (Wash. 1937).....17

State v. Ervin, 147 P.3d 567 (Wash. 2006).....*passim*

State v. Harris, 385 P.2d 18 (Wash. 1963) 12

State v. Jackson, 424 P.2d 313 (Wash. 1967).....12

State v. Labanowski, 816 P.2d 26 (Wash. 1991).....4, 8, 9, 13

FEDERAL AND OTHER JURISDICTIONS

Arizona v. Washington, 434 U.S. 497 (1978) 11

Brazzel v. Washington, 491 F.3d 976 (9th Cir. 2007).....*passim*

Catches v. United States, 582 F.2d 453 (8th Cir. 1978).....10

Illinois v. Somerville, 410 U.S. 458 (1973) 11

Jones v. United States, 620 A.2d 249 (D.C. 1993).....10

Mauk v. State, 605 A.2d 157 (Md. App. 1992) 21

Oregon v. Kennedy, 456 U.S. 667 (1982).....11

People v. Fields, 914 P.2d 832 (Cal. 1996).....21

Richardson v. United States, 468 U.S. 317 (1984).....8

Selvester v. United States, 170 U.S. 262 (1898).... 11, 17

State v. Davis, 266 S.W.3d 896 (Tenn. 2008) 10

TABLE OF AUTHORITIES – Continued

Page

State v. Klinger, 698 N.E.2d 1199 (Ind. App. 1998) 21

State v. Powell, 608 A.2d 45 (Vt. 1992) 10

United States v. Allen, 755 A.2d 402 (D.C. 2000), *cert. denied*, 533 U.S. 932 (2001) 21

United States v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997) 19, 20

United States v. Dinitz, 424 U.S. 600 (1976) 11

United States v. Jackson, 726 F.2d 1466 (9th Cir. 1984) 9, 10

United States v. Perez, 9 Wheat. 579, 6 L. Ed. 165 (1824) 8, 11

United States v. Tsanas, 572 F.2d 340 (2nd Cir.), *cert. denied*, 435 U.S. 995 (1978) 8, 10

United States v. Williams, 449 F.3d 635 (5th Cir. 2006) 21

Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949) 11

Williams v. Taylor, 529 U.S. 362 (2000) 15, 16

Yeager v. United States, ___ U.S. ___, 129 S. Ct. 2360 (2009) 8

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution 7, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 2254(d)(1) 15

28 U.S.C. § 2254(d)(2) 15

Wash. Rev. Code § 9A.32.055 4

RULES AND REGULATIONS

Wash. CrR 6.15 12

STATEMENT OF THE CASE

Petitioner, Carissa Marie Daniels, was tried on an information alleging that she committed homicide by abuse or, in the alternative, murder in the second degree (felony murder). Clerk's Papers ("CP") 5-6. The victim of these charges was petitioner's two-month old son, Damon-Krystopher Daniels or "DK". Id.

The facts adduced at trial showed the following: DK was born on July 18, 2000, a full term, healthy infant. Report of Proceedings ("RP") 342-345. Less than two months later, on September 14, 2000, he was pronounced dead at a hospital emergency room; hospital staff called the medical examiner's office to investigate the suspicious death. RP 123-125. The autopsy of DK's body revealed multiple injuries of differing dates indicating that he had been subjected to blunt force trauma on more than one occasion. RP 491-492. DK had a total of ten broken ribs that were approximately 10 days to 2 weeks old. RP 462-467. He had subdural and subarachnoid hemorrhages on both sides of his head. RP 472-479. There was evidence of newer injury (bleeding) superimposed over older injury; the newer injury was a day or two old and the older injuries were about two weeks old. RP 472-483. These hemorrhages caused the brain to swell until it was incapable of function. The injuries were consistent with DK having been shaken violently on more than one occasion. RP 168-169, 177-178, 477-486. Additionally, DK had a torn frenulum, and a bruised and swollen eye. RP 425-492.

The day that DK died, petitioner had an appointment at a health clinic for DK, but she showed up for the appointment without her baby, stating that she forgot him at home. RP 254-255. Petitioner testified that she awoke that morning at 7:30, fed DK, changed his diaper and then left DK with her boyfriend, who was still asleep, forgetting to take DK to his appointment at the clinic. RP 1080-1083, 1098-1099. She received a page late in the afternoon from her boyfriend, Weatherspoon, who was concerned about DK. RP 860. Weatherspoon testified that he did not awaken until approximately 3:00 p.m. and found DK next to him on the bed; DK was unresponsive so he paged petitioner. RP 855-860. Petitioner returned home and, after attempting CPR, called 911. RP 897-902. The paramedic responding to the call indicated that when he tried to intubate DK, his jaw was stiff; this stiffness was indicative of rigor mortis, which meant that DK had been dead for some time. RP 103, 434-435. The infant had no vital signs and the paramedic concluded that the infant was already dead. RP 105-106.

DK lived with the petitioner and her boyfriend, Weatherspoon, who was not DK's biological father. Petitioner was the primary caregiver and, except for two occasions, only petitioner or Weatherspoon cared for the baby. RP 230-231, 1058-1059. On September 11, 2000, a close friend of petitioner's watched DK from approximately 8:30 in the morning until 11:00 at night while petitioner and Weatherspoon went to a fair. RP 367-368, 382-390. The friend testified that

DK did not suffer any injury while he was in her care, but that he would vomit after eating. RP 373, 380-381. On September 12, petitioner left DK in the child care center at her school for three hours. RP 393-396. An experienced child care worker held him for most of that time because he was fussy, would not eat, and could not be soothed. Id. The childcare worker felt that there was something wrong but "couldn't put [her] finger" on what it was. RP 396, 401. Each of the babysitters noticed behavior that were consistent with internal bleeding such as vomiting, refusal to eat, and extreme fussiness, but neither saw any bruises on his face; bruising that was apparent at the time of his death. RP 373-375, 380-381, 395-397. The jury heard from all four of DK's caregivers; the State called the two babysitters to testify; petitioner called her boyfriend to the stand as well as testifying on her own behalf. RP 368-373, 393-401, 815, 1047. Both the boyfriend and petitioner denied causing any injury to DK. RP 924-926, 1107-1108. At trial, petitioner asserted that Weatherspoon must have inflicted the injuries although she had denied any such suspicions to the detectives investigating DK's death. RP 1108, 1230-1234, 1259.

The State charged petitioner with homicide by abuse[1] or, in the alternative, with felony murder in

---

[1] "A person commits the crime of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child and the person has previously engaged in a pattern or practice of assault

(Continued on following page)

the second degree, alleging predicate felonies of assault in the second degree and criminal mistreatment. CP 86-87. At trial, petitioner submitted proposed instructions using the "unable to agree" format favored by the Washington Supreme Court. *State v. Labanowski,* 816 P.2d 26 (Wash. 1991). See CP 7-32, Defense Proposed Instruction No. 22 and Proposed Verdict Form B. Defendant did not object to the court's jury instructions which adopted this language. RP 1281-1282. The jury was instructed to consider the crimes as follows:

> . . .
>
> When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. ***If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A***
>
> If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternatively charged crime of murder in the

---

or torture of the child." See CP 33-57, Instruction No.5; Wash. Rev. Code § 9A.32.055

> second degree. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.
>
> Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of the verdict or verdicts to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

Instruction 23, CP 33-57 (emphasis added). After hearing the evidence, the jury returned its verdict leaving Verdict Form A blank,[2] and finding defendant guilty of felony murder in the second degree on Verdict Form B. CP 107-108.

Once the jury was brought in to declare its verdicts, the court announced the verdicts stating that "Verdict form A is blank" then reading the entirety of Verdict Form B: "We, the jury, having found the defendant Carissa M. Daniels not guilty of the crime of homicide by abuse as charged in Count 1, or being unable to unanimously agree as to that charge, find the defendant guilty of the alternatively

---

[2] Verdict form A was worded as follows: "We, the jury, find the defendant _____ (Not Guilty or Guilty) of the crime of homicide by abuse as charged in Count I." CP 107-108.

charged crime of felony murder in the second degree. Signed by the presiding juror." RP 1380-1381. The court polled the jury and each juror agreed that the verdicts accurately reflected his or her own verdict as well as the verdict of the jury. RP 1381-1385. After verifying that all 12 jurors had agreed as to the correctness of the verdicts, the court excused the jury without any objection from petitioner.

Petitioner appealed to the Washington Court of Appeals. In a decision issued subsequent to petitioner's trial, the Washington Supreme Court had invalidated the use of felony assault as a predicate felony for felony murder; the Court of Appeals vacated the conviction for murder in the second degree based upon this decision and remanded for new trial on felony murder predicated on criminal mistreatment. Pet. App. at 41a-46a. The Court of Appeals further ruled that the blank verdict form A constituted an "implied acquittal" of the charge of homicide by abuse and held that the Double Jeopardy Clause barred retrial on this greater charge on remand. Pet. App. 36a-53. The State successfully sought review in the Washington Supreme Court of the ruling barring retrial on the homicide by abuse charge. The Supreme Court found that the double jeopardy issue was controlled by its recent decision in *State v. Ervin*, 147 P.3d 567 (Wash. 2006). The Supreme Court found that under the given instructions, the jury had expressly indicated its inability to agree on the greater charge of homicide by abuse by leaving Verdict Form A blank. The court

found it inappropriate to treat this verdict form as an implied acquittal as that was contrary to the instructions. As the jury expressed its inability to reach unanimous agreement on the greater charge, petitioner remained in continuing jeopardy for this offense once her conviction for felony murder in the second degree was vacated on appeal. Pet. App. 28a-35a.

Petitioner sought reconsideration in the Supreme Court after the Ninth Circuit published its decision in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), but the majority of the court did not alter its decision. Pet. App. 1a-2a. Petitioner now seeks review.

REASONS FOR DENYING THE PETITION

A. Petitioner asks this court to review the propriety of giving "unable to agree" instructions, the sufficiency of their wording regarding jury deadlock and the necessity of declaring a mistrial when a jury so instructed cannot agree on the greater charge when none of these issues were properly preserved or litigated below.

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The two important interests that this clause protects are to prevent the State from making repeated attempts to convict an individual of

an alleged offense and to preserve the finality of judgments. *Yeager v. United States*, ___ U.S. ___, 129 S. Ct. 2360, 2365 (2009). This court has held that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). This Court has made it clear that "the failure of the jury to reach a verdict, is not an event which terminates jeopardy." Id.; see also *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165 (1824). Consequently, retrial following a "hung jury" does not normally violate the Double Jeopardy Clause because this is an instance of continuing jeopardy. *Richardson*, 468 U.S. at 324.

1. **Washington favors "unable to agree" instructions; not only did petitioner fail to challenge the propriety of giving such instructions, her proposed instructions mirrored those given by the trial court.**

Nearly twenty years ago the Washington Supreme Court held that a jury could be properly instructed on lesser or alternative charges using either an "acquit first" form of instruction or an "unable to agree" form as neither was erroneous as a matter of law. *State v. Labanowski*, 816 P.2d 26, 36 (Wash. 1991). The Washington court noted that while some jurisdictions allowed the defendant to elect his preferred method of instruction, citing *United States v. Tsanas*, 572 F.2d 340 (2nd Cir.), *cert. denied*, 435

U.S. 995 (1978), and *United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984), it would not adopt the election rule. *Labanowski*, 816 P.2d at 34-36. Noting that "each type of instruction has potential advantages and disadvantages for both the prosecution and the defense[,]" the court found that there were strong policy reasons for favoring the "unable to agree" form of instruction. Id. at 35-37. Chief among these reasons was that this form of instruction "insures that a jury will not be prevented from entering a verdict which it has determined to be correct, and avoids the potential burdens and expenses of unnecessary mistrials." Id. at 36. Specifically, the court found that instructing the jury to first consider the greater offense "adequately insures the jury will give due attention to the crime charged." Id. The court rejected an argument that allowing the jury to determine, for itself, whether it was unable to reach a unanimous verdict on the greater charge constituted an improper invasion or breach of the trial court's duty to declare deadlock. Id.

Two principles emerge when using the "unable to agree" form of instruction under *Labanowski*: 1) the jury, and not the court, determines deadlock; and, 2) when a jury is deadlocked on the greater charge, yet returns a verdict on a lesser or alternative offense, it is unnecessary to declare a mistrial. A mistrial denotes the termination of a trial prior to its normal conclusion. Under the "unable to agree" form of instruction, a jury who finds a defendant guilty of a lesser offense after reaching deadlock on the greater

offense has followed its instructions and completed every task that has been asked of it. No mistrial is necessary because the jury has completed its duty.

As noted in the petition, several jurisdictions have approved use of the "unable to agree" form of instruction while others use "acquit first" instructions; there is considerable divergent opinion regarding the advantages and disadvantages of the competing methods of instruction. See *State v. Davis*, 266 S.W.3d 896, 905-06 (Tenn. 2008) (surveying jurisdictions). While jurisdictions differ as to which method of instruction is preferred, there appears to be little disagreement with the Washington Supreme Court that either method is constitutionally sound. Thus, a defendant in a jurisdiction that gives him the right to elect his preferred method of instruction, but who fails to make such an election, has no issue of constitutional magnitude that may be raised for the first time on appeal or in a later habeas proceeding. See *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Jones v. United States*, 620 A.2d 249, 252 (D.C. 1993); *State v. Powell*, 608 A.2d 45, 47 (Vt. 1992). These courts have recognized that there is nothing constitutionally deficient in the "unable to agree" form of instruction.

Where a trial is terminated before its normal conclusion by the declaration of a mistrial and the termination is over the objection of the defendant, this Court requires a showing that the declaration of

mistrial was a "manifest necessity" in order to avoid the double jeopardy bar to retrial. *United States v. Perez*, 9 Wheat. 579, 580 (1824). While other situations have been recognized by the United States Supreme Court as meeting the "manifest necessity" standard, the hung jury remains the most frequent example. See *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Illinois v. Somerville*, 410 U.S. 458, 463 (1973); *Selvester v. United States*, 170 U.S. 262, 269 (1898). The "manifest necessity" standard provides sufficient protection to the defendant's interests in having his case decided by the jury first selected while at the same time maintaining "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949). When a mistrial is declared at the request or with the approval of the defendant, however, different principles apply. Where the defendant has elected to terminate the proceedings against him, the "manifest necessity" standard has no place in the application of the Double Jeopardy Clause. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982); *United States v. Dinitz*, 424 U.S. 600, 607-10 (1976).

Petitioner seeks review in this Court arguing that the language of the "unable to agree" instructions does not adequately demonstrate that the jury was hopelessly or irreconcilably deadlocked so as to meet the "manifest necessity" requirement for declaring a mistrial. Petition at pp. 15, 22-28. However, petitioner did not preserve an objection to

the wording of the instruction in the trial court or to the trial court's use of the "unable to agree" format. Washington law requires a party objecting to the giving or refusal of an instruction to state the reason for the objection on the record. Wash. CrR 6.15. It is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Jackson*, 424 P.2d 313, 316 (Wash. 1967). The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 564 P.2d 781, 782 (Wash. 1977). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 385 P.2d 18, 27 (Wash. 1963). Here the trial court below gave "unable to agree" instructions consistent with petitioner's proposed instructions. See CP 7-32, Defense Proposed Instruction No. 22 and Proposed Verdict Form B; CP 33-57, 107-108. Not surprisingly, petitioner did not object to the court's instructions, which mirrored her proposed wording. RP 1281-1282. This court should deny review because petitioner not only failed to object to the wording of the instructions, petitioner invited the court to instruct the jury in the very language of which she now complains.

2. Petitioner failed to preserve her claim that a trial court is required to declare a mistrial whenever a jury cannot reach an agreement on a greater charge under "unable to agree" instructions.

By proposing instructions using the "unable to agree" format, petitioner understood that her trial could end with a hung jury on the greater charge without the need for the trial court to declare a mistrial. Under *Labanowski*, such instructions allowed for her trial to fully conclude, without requiring the jury to reach a unanimous decision on the greater charge. See also *State v. Ervin*, 147 P.3d at 572, n.10. As petitioner sought and obtained instructions that allowed the jury to be dismissed without unanimously acquitting her of the greater offense, she cannot now complain that the instructions were deficient or improper or that she did not agree to this procedure. Petitioner could have raised and preserved this claim in many ways: 1) by proposing "acquit first" instructions and objecting to the court's failure to give her proposed instructions; 2) by asking the court to direct the jury to further deliberate on the greater charge of homicide by abuse; or, 3) by objecting to the dismissal of the jury without its having returned a unanimous decision on the charge of homicide of abuse. Her failure to raise any of these objections means that this issue was not properly preserved for review. This is a reason to deny the petition.

Additionally, petitioner did not timely raise her arguments about the alleged deficiencies in the instructions in the appellate courts below. On appeal, petitioner argued that the jury's verdict should be construed as an implied acquittal; she did not contend that the trial court erred in not properly discerning and documenting jury deadlock. The Court of Appeals decision, as well as the initial decision of the Supreme Court, focused on the meaning and effect of the verdict form on the greater offense and whether it constituted either an implied acquittal or an expression of the jury's deadlock. See Pet. App. 24a-32a, 47a-51a. There was no determination or discussion as to whether the given instructions impermissibly allowed the jury to determine its own deadlock at something less than a "manifest necessity" standard or whether that standard had to be met under the procedural posture of this case. Id. These are issues that petitioner presents for review to this Court but they were not raised or determined below. The only discussion of these issues in the opinions below is found in the dissenting opinions to the court's denial of petitioner's motion for reconsideration, a discussion apparently sparked by the Ninth Circuit's intervening decision in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007). See Pet. App. 2a-23a. Petitioner seeks review of a claim in this Court when it was not raised in a timely manner before the state courts or fully litigated below. This provides a reason for denying the writ.

B. Petitioner overstates the existence of a conflict between the Ninth Circuit and Washington Supreme Court; she relies upon a decision where the Ninth Circuit was applying the AEDPA standard on habeas review which does not represent a clear "holding" of that court.

By enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress prohibited federal courts from granting habeas relief unless a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the relevant state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). AEDPA marked a significant change from former practice by limiting the "clearly established law" requirement to that "determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Prior to AEDPA, United States Courts of Appeal would look to their own jurisprudence – in addition to Supreme Court decisions – in deciding whether to grant federal habeas relief. See *Williams v. Taylor*, 529 U.S. 362, 381-82 (2000). Under AEDPA, if the United States Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle," lower federal courts cannot themselves establish such a principle to satisfy the AEDPA bar. Id. at 381. A federal court's focus is no

longer on whether it believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold. See id. at 410.

Petitioner asserts that a significant conflict exists between the Washington Supreme Court, citing its decisions in this case and in *State v. Ervin*, 147 P.3d 567 (Wash. 2006), and the Ninth Circuit Court of Appeals, based upon its decision in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007). In *State v. Ervin*, the Washington Supreme Court found that when a jury is given "unable to agree" instructions which direct it to leave the verdict form blank on the greater charge if it cannot reach a unanimous decision and proceed to consideration of the lesser charge, the jury cannot be deemed to have been "silent" on the greater charge when the jury returns a blank verdict form on a greater charge while convicting on a lesser offense. *Ervin*, 147 P.3d at 572. The court reasoned that juries are presumed to follow their instructions and under the given instructions the blank verdict form was an expression of the jury's inability to agree. Id. Under these circumstances the blank jury form is not equivalent to an implied acquittal on the greater offense. 147 P.3d at 572. The *Ervin* court went on to state:

> The instructions and verdict forms are a part of the record. Both the United States Supreme Court and this court have found that "where a jury ha[s] not been silent as to a particular count, but where, on the

> contrary, a disagreement is formally entered on the record," the implied acquittal doctrine does not apply. *Selvester [v. United States]*, 170 U.S. at 269, 18 S.Ct. 580; see also *[State v.] Davis*, 190 Wash. at 166-67, 67 P.2d 894. Therefore, regardless of any inquiry by the trial court, the blank verdict forms indicate on their face that the jury was unable to agree. Because the jurors were unable to agree, we cannot consider them to have acquitted Ervin of the greater charges. Thus, Ervin has no acquittal operating to terminate jeopardy.

147 P.3d at 572 (footnotes omitted). The *Ervin* court further held that the conviction on the lesser offense will bar retrial on the greater offense *unless and until* that lesser conviction is overturned on appeal. Id. at 573. When deciding petitioner's case, the Washington Supreme Court followed the precedent it had set in *Ervin*. Pet. App. at 24a-32a.

In *Brazzel*, the Ninth Circuit was reviewing a habeas petition filed from a Washington Court of Appeals decision that predated the Washington Supreme Court's decisions in *Ervin* and this case. As explained below, the decision of the Ninth Circuit was under an AEDPA standard of review; thus the *Brazzel* decision does not contain a definitive "holding" by the Ninth Circuit as to how it would decide the double jeopardy issue were the issue before that court in a direct appeal.

In *Brazzel*, the Ninth Circuit reviewed the unpublished decision of the Washington Court of Appeals holding that a verdict form on a greater charge left blank under "unable to agree" instructions constitutes an implied acquittal of that charge when the jury returns a verdict on a lesser charge. While the Ninth Circuit noted that the Court of Appeals holding in the *Brazzel* case was in apparent conflict with a subsequent decision of the Washington Supreme Court, *State v. Ervin*, 147 P.3d 567 (Wash. 2006), that fact did not alter how the Ninth Circuit reviewed the decision before it.

The Ninth Circuit acknowledged that "[n]o [United States] Supreme Court case addresses precisely" whether a verdict form left blank under the "unable to agree" form of instructions constitutes an implied acquittal which would raise a double jeopardy bar to further prosecution. *Brazzel*, 484 F.3d at 1095. This fact limited the Ninth Circuit's ability to find that the state court decision on this issue was "contrary to" federal law. The federal court had to give deference to the Court of Appeals decision in Brazzel's case just as it would have to give deference to the decision of the Washington Supreme Court in *Ervin* or petitioner's case were they to come before the Ninth Circuit for review in a habeas proceeding.

The Ninth Circuit deferred to the determination by the Washington Court of Appeals that the jury, by leaving the verdict form blank on the greater charge while convicting Brazzel of a lesser offense, had impliedly acquitted him of the greater offense. This

decision cannot be fairly characterized as the "holding" of the Ninth Circuit on that particular point of law.

Moreover, while it might be fair for petitioner to argue that the Ninth Circuit appeared critical of the *Ervin* decision based upon commentary found in a footnote in the *Brazzel* decision, 491, F.3d at 984, n.1, it is an overstatement to describe this criticism as a "holding" of the Ninth Circuit. The entire footnote could be eliminated from the opinion without disruption to the analysis it sets forth. Later portions of the opinion do not support a conclusion that the Ninth Circuit is in complete disagreement with the *Ervin* decision. The Ninth Circuit examines the *Ervin* decision, along with two others and concludes that in all three cases there was sufficient evidence in the record of the jury being hopelessly deadlocked so as to allow retrial without violating double jeopardy. *Brazzel,* 491 F.3d at 984-85.

Also included in this trio of cases was the decision of the Eighth Circuit Court of Appeals in *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997). In that case the trial court submitted the case to the jury with instructions on the greater offense of attempted aggravated sexual abuse as well as on the lesser included offense. The jury was given an "unable to agree" type instruction that read "If your verdict under these instructions is not guilty, or if, after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether defendant is

guilty of the crime of abusive sexual contact under this instruction." *Bordeaux*, 121 F.3d at 1190. When it could not agree on the greater charge, the jury, as instructed, wrote on the verdict form for that offense that "[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge 'Attempted Aggravated Sexual Abuse.'" Id. at 1192. The jury went on to convict Bordeaux of the lesser charge. When Bordeaux obtained a reversal of the conviction on the lesser offense, the issue arose as to whether he could be retried on the greater offense. The Eighth Circuit held that the government could proceed on the greater charge as the record showed that the jury had been unable to agree on the greater charge. Id. at 1193. The Ninth Circuit did not criticize the decision in *Bordeaux* as being inconsistent with the double jeopardy jurisprudence of this Court.

The jury in Bordeaux's case was instructed to write a note expressing its inability to agree on the verdict form while the jury in petitioner's case was instructed to leave the verdict form blank. Both cases involve the jury following the given instructions as to how to express its inability to agree on a particular charge. This court in *Ervin* and the Eighth Circuit in *Bordeaux* each considered relevant decisions of the United States Supreme Court on double jeopardy and each reached a similar conclusion. The Ninth Circuit appears to weigh heavily the means a jury uses to indicate its inability to agree, preferring the *action* of documenting its lack of agreement in writing as opposed to the *inaction* of leaving a verdict form

blank. This suggests not so much a disagreement over the fundamental principles surrounding hung juries and double jeopardy protections as it does disagreement over the relatively minor particulars of how jury disagreement is documented in the record. Petitioner has failed to show that a significant conflict exists between the Washington Supreme Court and the Ninth Circuit that must be resolved by this Court.

Notably, other jurisdictions have come to similar conclusions as Washington and the Eighth Circuit. See *United States v. Williams*, 449 F.3d 635 (5th Cir. 2006) (where record shows the jury was unable to reach an agreement, blank jury form does not preclude retrial); *United States v. Allen*, 755 A.2d 402, 410 (D.C. 2000), *cert. denied*, 533 U.S. 932 (2001); *Mauk v. State*, 605 A.2d 157, 170-71 (Md. App. 1992); *State v. Klinger*, 698 N.E.2d 1199, 1202 (Ind. App. 1998); see also *People v. Fields*, 914 P.2d 832 (Cal. 1996) (concluding that the Fifth Amendment of the United States Constitution does not compel application of the doctrine of implied acquittal in every case in which the jury returns a verdict of guilty on the lesser included, but determining that independent state grounds prevented retrial on greater offense). Petitioner has failed to show the existence of a true conflict that needs prompt resolution by this Court.

CONCLUSION

This court should deny the petition for certiorari. Petitioner seeks to challenge the propriety of giving "unable to agree" type of instruction when she proposed instructions in the trial court using this format. Petitioner did not assert her claim that such instructions impermissibly allow a jury to determine whether it's deadlocked under an incorrect standard in the trial court or timely raise this issue on appeal. Under Washington law, petitioner was on notice that this form of instruction allowed the jury to fully complete its duty and be dismissed without necessarily coming to a unanimous decision on the greater offense and without the need for a mistrial. When this occurred in her own trial, petitioner did not object to the dismissal of the jury. This case does not present a proper vehicle for an examination of these claims. Moreover, petitioner has failed to convincingly demonstrate that a true conflict among jurisdictions exists that must be resolved by this court. This court should deny the petition for certiorari.

Respectfully submitted this 15th day of July, 2009.

GERALD A. HORNE
Pierce County Prosecuting Attorney

KATHLEEN PROCTOR*
Senior Appellate Deputy
930 Tacoma Avenue South,
Room 946
Tacoma WA 98402
(253) 798-6590

Counsel for Respondent

**Counsel of Record*